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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROLYN C. CLEVELAND,

Petitioner,

v.

POLICY MANAGEMENT SYSTEMS CORP., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
600 Harrison Street
Suite 535
San Francisco, CA 94107
(415) 227-4655

ALAN B. EPSTEIN
Counsel of Record
JABLON EPSTEIN,
A Professional Association
Ninth Floor, The Bellevue
Broad Street at Walnut
Philadelphia, PA 19102
(215) 790-0300

Attorneys for *Amici Curiae*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION and
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*?

2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts that she is a "qualified individual with a disability" under the ADA?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Constitutional Provisions:

Statutes:

Rules:

Miscellaneous:

INTEREST OF *AMICI CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes.[1] NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law and civil rights issues. Some recent cases before this Court and other courts are: *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998); *Oncale v. Sundowner Offshore Services Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1998); *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 117 S.Ct. 1466 (1997); *Kapche v. City of San Antonio*, No. 98-50345 (5th Cir. 1998); *McNemar v. The Disney Stores, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 958 (1997); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995); and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995).

NELA members have brought numerous cases under the Americans with Disabilities Act. NELA members have also represented thousands of individuals in this

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[1] The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. No persons other than the *Amici Curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect, and defend the interests of employees involved in workplace disputes, including workers who are involved in litigation under the ADA.

This case represents an opportunity to address the inconsistent and inherently unfair application of the judicial estoppel doctrine, which has operated to preclude many potential plaintiffs from successfully litigating their claims of disability discrimination under the ADA. NELA submits this brief to urge the Court to abandon the use of judicial estoppel doctrine in cases under the ADA. In so doing, NELA seeks to protect the interests of its members and their clients, by helping to ensure that the goal of the Americans with Disabilities Act is fully realized.

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association of approximately 50,000 members across the country. ATLA members primarily represent plaintiffs in personal injury suits, civil rights actions and employment discrimination cases. For over 50 years, ATLA's mission has been to preserve the right to trial by jury in civil cases guaranteed by the Seventh Amendment. In addition, ATLA has been a staunch supporter of the Americans with Disabilities Act, and ATLA members have represented plaintiffs seeking vindication of their rights under the Act through civil actions.

SUMMARY OF THE ARGUMENT

The use of judicial estoppel against ADA claimants who have applied for or received disability benefits is a devastating new use for this obscure, amorphous, and previously rarely used doctrine. In recent years, it has been a favorite defensive weapon used by employers in ADA cases where the wronged employee or job seeker has applied for or received disability benefits. Increasingly, it is being used by courts to deprive persons with disabilities of the opportunity to be heard as an equitable sanction against perceived inconsistency.

Amici suggest that judicial estoppel is a pernicious doctrine that deprives persons with disabilities of the intended protections of the ADA, and violates the right of a qualified individual to his or her Seventh Amendment right to a jury trial. More importantly, the professed concerns of courts employing this antiquated and unnecessary doctrine are better served by application of our modern rules of procedure, including those governing alternative pleading, summary judgment, and the imposition of sanctions for the assertion of frivolous claims.

On behalf of the 54 million Americans who report some form of physical or mental disability,[2] and in compliance with the clear intent of Congress when it passed the ADA on July 26, 1990, *Amici* propose that the harsh

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[2] The United States Department of Commerce in its press release of September 16, 1997 stated that between October, 1994 and January, 1995, approximately 54 million Americans (one in every five) reported some level of disability, and 26 million Americans (one in every ten) reported their level of disability to be severe.

and unjust results often caused by the doctrine's application could be avoided, by abandoning its use in favor of other mechanisms better calculated to seek truth and civil justice.

Indeed, this position is well-supported by the following discussion of the origins and history of this inequitable doctrine, the unduly punitive effect on the right of a person with a disability to be heard under the provisions of an important civil rights law, and the facile correction of any claimant's improper action by using existing civil rules and mechanisms.

STATEMENT OF THE CASE

On January 7, 1994, Carolyn C. Cleveland ("Cleveland") suffered a stroke in the course of her employment with the Policy Management Systems Corporation ("PMSC"). As a result, she was afflicted with aphasia, a disorder affecting the processing of language (including speaking and reading), concentration, and memory.

On January 26, 1994, she signed an application (prepared by her daughter on her behalf) for Social Security disability benefits, certifying in the standard language of the Social Security Administration's ("SSA") computer-generated application forms that she "became unable to work because of my disabling condition on January 7, 1994" and that "I am still disabled."[3]

[3] Cleveland avers that she has no recollection of signing or filing the application.

As the result of intensive rehabilitative efforts, Cleveland returned to work on April 11, 1994[4] and advised the SSA's local agency, the Texas Rehabilitation Commission, that she no longer needed disability benefits. On July 11, 1994, the SSA officially denied her request for benefits.

Four days later, on July 15, 1994, Cleveland was terminated from her employment with PMSC. This event caused her to become depressed and exacerbated her aphasia to the extent that on September 14, 1998, she decided to renew her application for disability benefits by requesting the reconsideration of the earlier denial. Once again, she signed an SSA computerized form which stated that she was terminated "because I could no longer do the job because of my condition" and that she was "still disabled."

In January, 1995, Cleveland renewed her request for reconsideration of the denial of benefits and in May, 1995, she requested a hearing on the basis that in the language provided in the form, she was "unable to work due to my disability." In September, 1995, Cleveland was awarded disability benefits retroactively to January 7, 1994.

One week before the SSA's decision was published, Cleveland filed an action against PMSC for failing to accommodate her condition and terminating her because she was a person with a disability, all in violation of

[4] Following her return to work, Cleveland had problems carrying out her duties and requested accommodations (*inter alia*, computer training, permission to take work home, and transfer) which were denied by PMSC.

the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* and the applicable Texas statute.[5]

PMSC moved for summary judgment asserting that Cleveland could not establish that she was a "qualified individual with a disability," an essential element of her claim. In response, Cleveland averred in a sworn affidavit that she was unable to do her job because she was denied reasonable accommodation, and that her condition was worsened by her termination. She also proffered the opinion of her treating physician, who agreed that her discharge increased her symptoms to the point of disability, and that if she had been granted appropriate accommodation on the job, she would have been able to continue to work.

The district court granted the motion for summary judgment filed by PMSC and, on appeal, the United States Court of Appeals for the Fifth Circuit affirmed.[6] In making its decision, the Fifth Circuit refused to "adopt a *per se* rule that automatically and absolutely prevents an applicant for or recipient of social security disability benefits from asserting a claim of disability discrimination under the ADA"[7] but held that since there may "conceivably" be "credible, admissible evidence . . . sufficient to show that, even though he may be disabled for purposes of social security, he is otherwise qualified to perform the essential functions of his job with a reasonable accommodation and thus not

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[5] Tex. Lab. Code Ann. § 451.001 (Vernon 1996).

[6] *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513 (5th Cir. 1997).

[7] *Id.* at 517.

estopped from asserting an ADA claim," and that an "application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'"[8]

The Fifth Circuit then resolved that since Cleveland's "sworn statements to the SSA that she was disabled"[9] were continuous and unequivocal, she could not be permitted to contradict that position before the district court and therefore, was "judicially estopped from now asserting that for the time in question she was nevertheless 'a qualified individual with a disability' for purposes of her ADA claim."[10]

ARGUMENT

I. JUDICIAL ESTOPPEL IS AN ARCHAIC AND PERNICIOUS DOCTRINE WHICH VIOLATES STANDARDS OF FAIRNESS AND IS CONTRARY TO EXISTING RULES OF PROCEDURE.

A. The Judicial Estoppel Doctrine's History Reveals Conflict and Confusion.[11]

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[8] *Id.* at 518.

[9] *Id.* at 518.

[10] *Id.* at 519.

[11] Other forms of more easily justifiable estoppel have been, and continue to be, employed in federal litigation:

Equitable estoppel is designed to protect parties who have also been parties in a previous suit from the prejudice that would occur as a result of detrimental reliance on a previously

(continued...)

Judicial estoppel, which alternatively has been labeled as the doctrine against inconsistent positions or estoppel by oath,[12] is a concept based in equity jurisdiction that has been invoked by the courts (as opposed to the parties) for the avowed purpose of preventing litigants from gaining a litigation advantage by asserting incompatible positions in different proceedings.[13]

The doctrine was developed in the mid-1800s in an era before the promulgation of modern pleading rules (including the Federal Rules of Civil Procedure) to promote the broad public policy objectives of protecting the in-

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[11] (...continued)

asserted position. *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980).

Collateral estoppel (often called issue preclusion) serves to prevent litigants from relitigating identical issues. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979).

The doctrine of *res judicata* (claim preclusion) applies only when there is an identity of the parties in both suits. It is calculated to ensure that litigants rely on previous court rulings. *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

[12] See *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996); *Ellis v. Arkansas La. Gas Co.*, 609 F.2d 436, 440-41 (10th Cir. 1979); Douglas W. Henkin, *Judicial Estoppel-Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 n.1 (1991); Mark J. Plumer, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 410 n.8 (1987); Rand G. Boyers, *Comment-Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. Univ. L. Rev. 1244 (1986).

[13] The doctrine is clearly distinct from the other forms of preclusionary estoppel discussed above, including collateral estoppel or issue preclusion and res judicata or claim preclusion. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). See n.11.

tegrity of the judicial system and upholding the sanctity of the oath. Its aim was to prevent a litigant from "playing fast and loose with the courts"[14] or to bar a party from "speaking out of both sides of her mouth with equal vigor and credibility."[15] Unfortunately, as recognized by both the Tenth Circuit[16] and D.C. Circuit Courts of Appeal,[17] the doctrine also prevents a party from explaining a perceived inconsistency and may "impede the truth seeking purpose of the judicial system, as its use will more often than not result in a litigant's entire case being thrown out."[18]

In fact, conflicting assertions may not be actual inconsistencies, but merely reflections of changed circumstances. In the context of the ADA, a claimant like Ms. Cleveland, who asserts an ability to work after filing a claim of total disability, presenting contrary averments may not be "playing fast and loose" with the truth, but may only constitute a reflection of a later change in physical ability. A court employing the doctrine of judicial estoppel is, however, only required to

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[14] *McNemar v. Disney Stores, Inc.*, 91 F.3d 610, 617, 618 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 958 (1997); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

[15] *Reigel v. Kaiser Found. Health Plan of North Carolina*, 859 F.Supp. 963, 970 (E.D. N.C. 1994). *See also Rissetto v. Plumbers and Steamfitters Local 343, supra*, and *Dockery v. North Shore Med. Ctr.*, 909 F.Supp. 1550 (S.D. Fla. 1995).

[16] *Parkinson v. California Company*, 233 F.2d 432 (10th Cir. 1956).

[17] *Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980).

[18] Douglas W. Hanken, *Judicial Estoppel – Beating Shields Into Swords and Back Again, supra*.

review the facial consistency of the alleged untruthful prior assertions and not the facts behind them, and therefore, would thus be unable to exercise its truth-seeking function. Our courts generally have recognized the danger of taking a doctrinaire approach in the search for the truth in any case, because "truth is the essential objective of our adversary system of justice." *U.S. v. Beechum*, 582 F.2d 898 (5th Cir. 1978). This Court has refused to accord a collateral estoppel effect when the result would be to prevent the "fullest possible inquiry" into the evidence, *Brown v. Felson*, 442 U.S. at 138 (1979), and to "blockade unexplored paths that may lead to truth." *Id.* at 132. *See also Estes v. Texas*, 381 U.S. 532, 540 (1965) (discovering truth is the "*sine qua non* of a fair trial") and *Nix v. Williams*, 467 U.S. 431, 445 (1984) (our legal system exalts "the search for truth in the administration of justice").

The doctrine has never been uniformly defined or adopted by either state or federal courts, nor has it ever been the subject of an explicit ruling by this Court. The first appearance of the doctrine was in the 1857 Tennessee Supreme Court case of *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857) wherein a store clerk was prohibited from pursuing a claim of partnership when he had asserted in an earlier court action that he was only an employee. Since that time, federal and state courts discussing the doctrine have applied it with differing formulations or rejected it outright.[19] See, for

[19] For a comprehensive survey of those state and federal courts that have accepted or rejected the use of the doctrine, see *Judicial Estoppel – Beating Swords into Shields and Back Again, supra,* Appendix and n.3.

example, the state court decisions in *Ray v. Midfield Park, Inc.*, 289 Ala. 137, 142, 266 So.2d 291, 295 (1972), *Long v. Knox,* 155 Tex. 581, 585, 291 S.W.2d 292 (1956) and *Allen v. Allen,* 550 P.2d 1137, 1142 (Wyo. 1976), which disagree as to whether the doctrine requires prior success, actual prejudice, or actions taken in a prior "judicial" proceeding. Additionally, at least three states have rejected the use of the doctrine completely. *See Brown v. Gerstein,* 17 Mass. App. Ct. 558, 460 N.E.2d 1043 (1984); *MacFarlane v. Manly,* 274 S.C. 392, 264 S.E.2d 838 (1980); and *Doyle v. State Farm Insurance Co.*, 414 So.2d 763 (La. 1982).

This lack of uniformity in the application and interpretation of the doctrine in state courts is also demonstrated by the multiplicity of conflicting opinions in the federal circuits which have applied the doctrine. The doctrine has been accepted in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh and Federal Circuits. It has been rejected by the Tenth and D.C. Circuits. While both the First and Second Circuits have accepted the doctrine, its continued applicability there has been placed in doubt, due to conflicting panel opinions.[20]

The Tenth and the D.C. Circuits reject the use of the doctrine because it precludes a search for the truth.[21]

[20] *Judicial Estoppel – Beating Swords into Shields and Back Again, supra,* at n.3.

[21] That judicial estoppel violates standards of fairness and due process because it suppresses the truth has been noted by this court and by other courts and commentators. The Court of Appeals for the Sixth Circuit has said that

(continued...)

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1522 (10th Cir. 1991); *Parkinson v. California Company, supra*; *United Mine Workers of America 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477 (D.C. Cir. 1993); *Konstantinidis v. Chen, supra.*

The Third Circuit appears to stand alone in allowing the application of the doctrine without the prerequisite of a *successful* prior proceeding. Compare *Ryan Operations GP v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996) with *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *U.S. for Use of American Bank v. CIT Const. Inc. of Texas*, 944 F.2d 253 (5th Cir. 1991); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982); *Astor Chauffeured Limousine v. Runnfeldt Investment Corp.*, 910 F.2d 1540 (7th Cir. 1990) (all agreeing prior success is necessary for application of judicial estoppel).

Additionally, the courts of the several circuits adopting the doctrine also appear to disagree as to whether the prior success need have been in a court of law or at least in a quasi-judicial proceeding. Compare *Ryan,*

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[21] (...continued)

> [j]udicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.

Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214, 1218 (6th Cir. 1990). *See also* Douglas W. Henkin, *Judicial Estoppel – Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 (1991) (judicial estoppel should be eliminated because it violates truth-seeking function of courts and liberal pleading policies of Federal Rules).

supra (Third Circuit) and *Rissetto, supra* (Ninth Circuit) to *Edwards v. Aetna Life Ins. Co., supra,* (Fifth Circuit) and *Dockery v. North Shore Medical Center, supra* (Eleventh Circuit). The circuit courts also seem divided even on the question of whether settlement in the prior proceeding constitutes the required "success." Compare *Rissetto*, 94 F.3d at 605 n.6 ("We hold that a favorable settlement constitutes the success required") to *Edwards*, 690 F.2d at 599, and *Konstantinidis*, 626 F.2d at 939 (settlement does not provide the prior approval of a court that the judicial estoppel doctrine requires).[22]

Finally, some of the Courts of Appeals have stated that judicial estoppel requires the reliance of and detriment (or prejudice) to the opposing party. *See Young v. U.S. Dept. of Justice*, 882 F.2d 633, 639-640 (2d Cir. 1989); *Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1578-80 (Fed. Cir. 1984); *Maitland v. University of Minnesota*, 43 F.3d 357, 363-364 (8th Cir. 1994).

As a result of this cacophony of voices from the circuits, the doctrine has been described as "rather

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[22] Commentators have generally followed the view that the prior proceeding must have been judicial in nature. *See* Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132, 1132 n.6 (1946); Mark J. Plumer, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 411 n.11 (1987) ("Given that the underlying policy objective of judicial estoppel is to preserve the integrity of the judicial process . . . the doctrine should be applied only when statements giving rise to the inconsistency are made in courts of law.")

vague,"[23] an "obscure doctrine,"[24] "lacking defined principles," "rather amorphous," and leading to "an *ad hoc* decision in each case."[25]

B. The Judicial Estoppel Doctrine is Incompatible with the Rules of Civil Procedure Governing Summary Judgment and Alternative Pleadings.

1. Credibility Determinations and Summary Disposition.

Based upon these splintered interpretations and inconsistent applications of the doctrine, it is clear that Carolyn Cleveland and many other ADA claimants have been barred from presenting their claims primarily because of the accident of the geography of their workplaces and the unguided discretion of the trial judge assigned to their cases. These circumstances beyond claimants' control are often then exacerbated by Courts of Appeals which allow or disallow the use of a doctrine contingent upon a *de novo* finding that a litigant appears to be lying or appears to have lied previously.

Indeed, the unhappy fact is that any trial judge or appellate body applying the doctrine must necessarily make credibility determinations and factual findings in direct violation of the prohibitions of Rule 56 of the Federal Rules of Civil Procedure and the requirements set forth by this Court in *Anderson v. Liberty Lobby,*

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[23] *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987).

[24] *U.S. v. Kattar*, 840 F.2d 118, 129 n.7 (1st Cir. 1988).

[25] *Nichols v. Scott*, 69 F.3d 1255, 1272 (5th Cir. 1995).

Inc., 477 U.S. 242, 249 (1986) ("It is not the role of the judge at the summary judgment stage to weigh the evidence or to evaluate credibility"). Allowing this doctrine to usurp the jury's traditional role should not be rationalized by wrapping summary disposition based on credibility determinations in an altruistic blanket of the very sanctity of our federal judicial system.

2. The Right to Make Alternative Averments.

Rule 8(e)(2) of the Federal Rules of Civil Procedure clearly permits a party to make inconsistent assertions in a single proceeding before our federal courts:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency, and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Fed.R.Civ.P. 8(e)(2).

Relying upon this policy of truth-seeking underpinning the federal rule condoning inconsistent pleadings, the Tenth Circuit in *Parkinson v. California Co., supra,* refused to apply the doctrine of judicial estoppel, stating that its use "would not be in keeping with the spirit of

. . . Rule 8(e)(2) . . . and would discourage the determination of cases on the basis of the true facts as they might be established ultimately." *See also Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428 (10th Cir. 1990); *Panama Processes, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 286 n.43 (Okla. 1990).

Quite simply, a doctrine that does not permit a claimant to plead inconsistent positions in two separate actions is itself "inconsistent" with the rules that govern in all federal courts—rules (specifically Federal Rule of Civil Procedure 8(e)(2)) that clearly allow a litigant to make those same inconsistent averments in a single action before any federal court.

II. THE JUDICIAL ESTOPPEL DOCTRINE VIOLATES DUE PROCESS.

Denying plaintiffs their opportunity for a full and complete hearing on the facts of each case (such as that which occurs when a judge invokes the doctrine of judicial estoppel) also directly conflicts with the right to a jury trial provided by the Seventh Amendment to the United States Constitution. The continued use of this common law preclusion doctrine violates the intent of the Founders that the right to trial not vary from the right that existed in the common law at the time of the Seventh Amendment's ratification in 1791.

The doctrine of judicial estoppel did not find a place in the common law until it was recognized in 1857 by the Supreme Court of Tennessee, nearly seventy years and three generations of Americans after the ratification of the Seventh Amendment. Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of*

Judicial Estoppel, 80 Nw. U. L. Rev. at 1245 (1986). In no sense is judicial estoppel a traditional preclusion doctrine grounded in the common law of the sort which warrants continued deference by the courts. Certainly, denying a trial to a litigant on the basis of perceived untruthfulness would constitute a loss of the firm anchor the Founders provided to the Seventh Amendment, based in the common law as they then knew it. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. at 337-357 (1979) (Rehnquist, J. dissent).

III. IN THE CONTEXT OF DISABILITY CLAIMS, THE APPLICATION OF THE JUDICIAL ESTOPPEL DOCTRINE DENIES FUNDAMENTAL FAIRNESS AND DUE PROCESS TO SERIOUSLY INJURED AMERICANS GRANTED PROTECTION UNDER THE ADA.

Throughout history, the disabled have been viewed and treated differently than other members of society:

> Images of the disabled as either less or more than merely human can be found throughout recorded history. There is the blind soothsayer of ancient Greece, the early Christian belief in demonic possession of the insane, the persistent theme in Judeo-Christian tradition that disability signifies a special relationship with God. The disabled are blessed or damned but never human.

Alan Gartner and Tom Joe, *Images of the Disabled, Disabling Images*, Introduction, pp. 1-2 n.1.

In this country, the disabled have been viewed as morally inferior, medically afflicted, and socially deviant. Jonathan C. Drummer, Comment, *Cripples, Over-*

comers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 UCLA L. Rev. 1341, 1345-55 (1993). *See also* Frank Bowe, *Handicapping America: Barriers to Disabled People* (1978) (discussing prejudice, physical barriers, and negative attitudes generally suffered by persons with disabilities).

These misperceptions of persons who suffer disabilities have resulted in less employment opportunity and greater underemployment, as compared to the non-disabled population. Edward Gellen, *Disabled Concern: The Social Context of the Work-Disability Problem*, 67 Millbank Q. 114 (1989). *See also* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 26 Harv. C.R.-C.L.L. Rev. 413, 422 (1991).

It was in the context of these unfortunate social and economic circumstances that Congress passed the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994).[26] *See* Timony M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 440-42 (1991).

The concept of providing direct economic aid to the disabled, however, long preceded the passage of the ADA. The disability benefit programs incorporated in the provision of Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) are

[26] The espoused goals of the Act were to assure to persons with disabilities "equality of opportunity" and "economic self-sufficiency." 42 U.S.C. § 12101(a)(8).

based upon the reality that medical and psychological impairments do often cause an inability to work.

The interrelationships and perceived contradictions of these two separate but different statutory schemes relating to the disabled have been the subject of numerous well-considered commentaries and studies, and will undoubtedly be the focus of the submissions of the petitioner, as well as several *amici curiae*, including that of the governmental agencies who were invited by the Court to participate.[27] Accordingly, these issues will not be examined herein except to set the basis for concluding that there is no inherent contradiction between making payments to the disabled and encouraging equality in the workplace for persons with disabilities:

> One attempt to reconcile these policies is to view the two statutory schemes as serving different groups of people. Under this view, the disability benefit programs are for people who "cannot work," while the ADA is intended to protect disabled people who "can" work. This view divides disability policy into two mutually exclusive spheres—people with disabilities may receive the protection of one of these statutes, but not both.
>
> Many judicial decisions have reconciled the ADA with the disability benefit programs in this

[27] *See, e.g.*, Wendy Wilkerson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. Tex. L. Rev. 907, 913-915 (1997); Anne E. Beaumont, Note, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. Rev. 1529 (1996).

> way by holding that disability benefit recipients are estopped from maintaining suits against their former employers under the ADA. These courts view an award of disability benefits as a binding admission by the individual that he or she cannot work. These decisions, however, oversimplify the relationship between the ADA and the disability benefit programs. They fail to recognize that the findings that support an award of disability benefits are not necessarily inconsistent with the elements of a claim of employment discrimination under the ADA. Moreover, these cases fail to appreciate the unfairness of requiring people with disabilities to select one remedy rather than another when both statutes rely on broad standards whose application is difficult to predict.

Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1007-1008 (April 1998) (citations omitted).

As suggested in the detailed discussions above, judicial estoppel impedes a complete investigation of the facts in any case. However, the preclusionary effect of the doctrine is especially pernicious in the context of denying persons with disabilities who have also been forced to avail themselves of disability benefits any opportunity to be heard on the facts of an ADA claim.

It has long been the policy of American jurisprudence in that regard that a litigant's right to be heard will be carefully guarded when it involves a broad and beneficial public policy. More specifically, this Court has always sought to guard the protectionist intent of Congress in the context of civil rights acts. *See University*

of Tennessee v. Elliott, 478 U.S. 788 (1986) (Title VII complainant's right to trial not precluded by unreviewed state administrative proceeding) and *Astoria Federal S & L Ass'n v. Solimino*, 501 U.S. 104 (1991) (same re: age complainant). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. at 49-51 (election of remedies doctrine not a bar to Title VII action based on prior arbitration under collective bargaining agreement).

The Court has also previously refused to allow preclusion where a trial was held to be necessary to vindicate important issues of public policy. *Perma Life Mufflers, Inc. v. Intern. Parts Corp.*, 392 U.S. 134, 136 (1968) (application of the *in pari delicto* doctrine reversed where it "threatens the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States"); *Brown v. Felsen, supra* (doctrine of collateral estoppel not a bar to subsequent action where its application would be inconsistent with the policies underlying the Bankruptcy Act).

More recently, this Court refused to apply an equitable preclusionary doctrine to deny a civil rights claimant the benefit of a full hearing on the issues. In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. ___, 115 S.Ct. 879 (1995), this Court has refused to allow the doctrine of "unclean hands" to prevent a plaintiff from pursuing claims filed under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or

> practices which violate national policies respecting nondiscrimination in the workforce is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misrepresentation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance.

McKennon, 513 U.S. at ___, 115 S.Ct. at 885 (1995).

This action by this Court was based upon the importance of upholding the broad public policy encompassed in the statutory scheme to protect employees in the workplace nationwide. Importantly, that framework of protection was held to include the provisions of the ADA. *McKennon*, 513 U.S. at ___, 115 S.Ct. at 884.

Contrary to this long line of authority, the Fifth Circuit Court of Appeals effectively denied Carolyn Cleveland's right to be heard by applying a doctrine of preclusion not unlike "unclean hands." Consistent with this Court's clear protection of civil rights policies, that action should not be upheld.

IV. OTHER EXISTING REMEDIES ARE ADEQUATE TO PROTECT LITIGANTS, THE COURTS, AND OUR SYSTEM OF JUSTICE FROM ABUSE.

Amici acknowledge that no litigation is "fair" unless it protects the interests of all parties. Certainly, employers in ADA cases are entitled to comprehensive protection from intentionally dishonest employees who undeservedly make claim to damages to which they are not entitled. That end, however, is not well served by the continued case of the doctrine of judicial estoppel:

> Judicial estoppel was developed to meet the perceived needs of protecting the judicial system at a time when rules of pleading were strict and unforgiving. In those days it could be forgiven, and might even have been necessary. But when the rules of pleading changed to reflect modern times, the doctrine of judicial estoppel was no longer necessary to protect those interests. Moreover, the doctrine conflicts with the policies behind the changed rules of pleading and is capable of working great injustices on litigants. Some courts have recognized these problems and have refused to apply the rule; others stubbornly hold on to it. But modern rules of evidence and attorney/litigant sanctions provide far better methods of protecting the interests that judicial estoppel sought to protect, while promoting the deeper policies behind the modern systems of pleading. For those reasons, judicial estoppel is a policy whose time has come and gone, and it, like common law and code pleading, should be consigned to the history books in any jurisdiction whose pleading system substantially parallels the Federal Rules of Civil Procedure.

Douglas W. Henkin, *Judicial Estoppel – Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. at 1755.

In this context, it is further enlightening that a recent study of the American Bar Association Commission on Mental and Physical Disability Law concluded that the prevailing axiom that the ADA unfairly favors employees was simply untrue, and that a review of over 1200 cases revealed that employers were successful 92 percent of the time. 22 *Mental and Physical Disability Law Reporter* 403 (1998). The report resolved that the rea-

sons employees tend to lose at such an alarming rate can be attributed to "two major 'catch-22's' that more often than not result in automatic dismissals of employment-related disability discrimination claims before those claims can be heard on the merits:"

> There is a fundamental catch-22 with respect to the ADA provisions that require a disability to be substantially limiting, while requiring employees with such a disability to be otherwise qualified to carry out essential job functions. In other words, employees have to have a severe enough disability, but it cannot be so severe that they are unable to do their job competently.
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> * * *
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> A second, less widespread but equally pernicious ADA catch-22 for those affected involves the doctrine of collateral estoppel. A number of courts have denied claims of employees with disabilities who have applied for or have received federal or state disability benefits-particularly social security and workers' compensation-which require applicants to assert that they are unable to work. Based on these assertions, some courts conclude that these employees are not otherwise qualified to carry out essential job functions. Thus, persons who lose their jobs because of disability discrimination may be forced to choose whether to file a discrimination suit, which may take a long time to resolve and in the interim would leave them without income, or file for disability benefits and risk undermining their discrimination claims.

Id. at 405.

In today's fora, litigant dishonesty is more appropriately dealt with by discretionary adherence to the panoply of established rules of procedure and evidence available to every trial court including:

(1) the admission of the perceived false statements as admissions of a party in interest in accordance with Federal Rules of Evidence 613 and 801(d)(1)-(2). *Parkinson v. California Co.*, 233 F.2d at 438; *see also Teledyne Industries, Inc.*, 911 F.2d at 1218 (noting reliance on Fed.R.Evid. 801(d)(1)(A) and 613); *Dockery*, 909 F.Supp. at 1559 (prior sworn statements in disability applications only "one more piece of evidence"); Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. at 1136 ("using a prior inconsistent statement as an admission is less drastic than precluding a change of position because the jury is not foreclosed from weighing the earlier position against the later one and deciding which represents the objective truth"); Rand G. Bowers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. at 1255 (impeachment better than "extreme measure of judicial estoppel");

(2) the use of Rule 11 of the Federal Rules of Civil Procedure which can be applied against both parties and their attorneys for pursuing frivolous suits or claims;

(3) the application of Rule 60(b) to reopen a judgment found to be inconsistent with the judgment of another court;

(4) the grant of summary judgment in cases where there is no reasonable basis to conclude that an ADA litigant is a qualified individual who can work with or without reasonable accommodation; and

(5) by reference of an intentionally dishonest claimant for action pursuant to statutory prohibitions against perjury.

By the use of one or more of these alternatives, which are currently available and provide a more reasoned and rational approach to a very controllable circumstance, no court need ever deny a civil rights claimant the right to a full hearing based on an anachronistic preclusionary doctrine.

CONCLUSION

It is respectfully suggested that the decision of the Court of Appeals for the Fifth Circuit should be reversed and the cause of Carolyn Cleveland under Title I of the Americans with Disabilities Act remanded for a full hearing on its merits.

Respectfully submitted,

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
600 Harrison Street
Suite 535
San Francisco, CA 94107
(415) 227-4655

ALAN B. EPSTEIN
Counsel of Record
JABLON EPSTEIN,
A Professional Association
Ninth Floor, The Bellevue
Broad Street at Walnut
Philadelphia, PA 19102
(215) 790-0300

Attorneys for *Amici Curiae*